Block C applicant completely undermine Petitioners allegations of intentional delay. Omnipoint's motive is and has always been to argue against the 49% equity exception. Further, Petitioners are incorrect as a matter of law when they argue that "colorable allegations of anticompetitive conduct is an area of legitimate Commission concern and should be investigated through a hearing." Petition at 12. In fact, the very Commission precedent the Petitioners cite for this proposition holds just the opposite. In Dubuque TV Ltd. Partnership, 66 RR 2d 88, 89 (1989), the Commission held that allegations of anticompetitive conduct must be supported with an adjudicative determination of a violation of state or federal anti-trust or anti-competition law. Petitioners' failure to do so in this case "is fatal . . . for the adjudicated status is essential to the relevance of a charge of economic misconduct under our basic qualifications criteria." *See also* Character Qualifications in Broadcast Licensing, 102 FCC 1179, 1202 (1985), *recon. denied*, 1 FCC Rcd. 421 (1986).

II. The Petition Should Be Dismissed As Improper and Unauthorized.

The Commission should simply dismiss the Petition. It requests action that is contrary to the statutory mandates of Section 309(j)(13)(E) of the Communications Act, is grossly out of time according to the Communications Act and the Commission's own pleading rules, and is abusive of the Commission's processes. What the Petitioners hope to accomplish by this aberrant request is not apparent.[8] However, a brief review of the OCI license grant should make clear the outright impropriety and illegality of the Petition.

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8 We also note that the Petitioners have chosen to file their Petition in a proceeding entitled "In the Matter of Deferral of Licensing of MTA Commericial Broaband PCS," PP Dkt. 93-253 and GEN Dkt. 90-314, that considered whether to stop the issuance of MTA licenses allocated through the MTA auction process. *See* Memorandum Opinion and Order, PP Dkt. 93-253, ET Dkt. 92-100, DA 95-1410 (WTB, released June 23, 1995), *appeal pending*, NABOB, *et al.* v. FCC, (D.C. Cir. No. 95-1392). It has nothing to do with Omnipoint's license allocated in the pioneer's program. Indeed, Omnipoint's license had been issued prior to the commencement of that proceeding. As the Petitioners well know and the face of the Licensing Order shows, the

(Footnote continued to next page)

On May 4, 1992, OCI and 55 other companies filed an application for a PCS pioneer's preference pursuant to the Commission's rules, 47 C.F.R. § 1.402. After several rounds of pleadings on the issue, OCI was granted a final preference on December 23, 1993 for the New York MTA. Third Report and Order, 9 FCC Rcd. 1337 (1993); Tentative Decision and Memorandum Opinion and Order, 7 FCC Rcd. 7794 (1992).

On February 25, 1994, the Commission invited OCI and the other two broadband PCS pioneer's preference grantees to file applications for their preference licenses. On April 28, 1994, OCI filed its license application and, on August 25, 1994, the Commission announced that it had accepted the application. *See*, FCC Public Notice, "Common Carrier Public Mobile Services Information, Announcement of Acceptance of Broadband PCS Applications," Report No. CW-94-1 (released Aug. 25, 1994). By September 26, 1994, the final day for timely oppositions to OCI's application, the Commission had received three oppositions, to which OCI fully replied on October 6, 1994.

In December, 1994, the Communications Act was modified to require the Commission to award a pioneer's license to OCI and the other two pioneer's preference grantees and not to entertain challenges to those awards:

> the Commission shall not reconsider the award of the preferences in such Third Report and Order, and the Commission shall not delay the grant of licenses based on such awards more than 15 days following the date of enactment of this paragraph, and *the award of such preferences and licenses shall not be subject to administrative or judicial review.*

47 U.S.C. § 309(j)(13)(E)(ii) (emphasis added). Pursuant to the statutory mandate, the Commission granted OCI's pending license application on December 14, 1995, and held that all

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(Footnote continued from previous page)
consideration of OCI's license application was taken up in an adjudicative proceeding, FCC File No. 15002-CW-L-94, not in the context of the referenced rulemaking proceeding. Petitioners attempt to create a rulemaking issue, that OCI's license has nothing to do with, is plainly inappropriate.

pending oppositions to the applications were rendered moot by the above-quoted statute. In the Matter of American Personal Communications, *et al.*, Memorandum Opinion and Order, 10 FCC Rcd. 1101, 1102 (1994) ("Licensing Order").

A. The Petition Is Improper Because It Requests the Commission To Act Contrary To The Mandate of Section 309(j)(13)(E) of the Communications Act.

OCI respects that it is a Commission licensee, and that it is obligated to meet the conditions of its license and operate in accordance with the Commission's rules just like any other PCS licensee. It agrees with the Commission's holding that if it "fails to comply with [the] . . . conditions of [its] license[], the Commission has available to it the full range of sanctions, including, for example forfeiture and/or license cancellation." Licensing Order at ¶ 5. However, the Petitioners do not challenge OCI on these matters, rather they request that the Commission reopen the OCI's *application* proceeding, Petition at 9-10, including issues presented in the timely petitions to deny, although they recognize that those issues were rendered moot by GATT. *Compare,* Petition at n. 9, *with*, *id*, at n. 8.

The Communications Act expressly forbids the Commission from reopening the *application* proceeding: "the award of such preferences and licenses shall not be subject to administrative . . . review." 47 U.S.C. § 309(j)(13)(E)(ii). As the Commission made clear in the Licensing Order at ¶ 5, "the GATT Act [now codified as cited above] has rendered moot any petitions to deny filed against the applications of APC, Cox and Omnipoint." Petitioners' attempt to reopen the application proceeding is, according to the Communications Act and the Commission's own ruling, impermissible. In short, the Petition is simply not a proper vehicle for challenge of OCI's license because it requests the Commission to act contrary to Section 309(j)(13)(E) and because it fails to demonstrate how OCI is not operating in accordance with its license.

B. The Petition is Unauthorized Because It Was Filed 360 Days After the Filing Window Closed.

As stated above, OCI's application was placed on public notice on August 25, 1994. Petitions to Deny were due on September 26, 1994. 47 C.F.R. § 24.830(a)(4) (petitions to deny application must "[b]e filed within thirty (30) days after the date of public notice announcing the acceptance for filing of any such application . . . .") Therefore, because the Petition was filed on September 21, 1995, it is 360 days late. There is simply no rational reason for the Commission to excuse the Petitioners' obviously inappropriate pleading, and it should not be accepted for filing. Memorandum Opinion and Order, 9 FCC Rcd. 7805, 7807 (1994) (Commission dismisses as untimely a petition for reconsideration filed 73 days after the statutory filing window closed). Even worse, the Petitioners do not seek a waiver of these filing rules. 47 C.F.R. § 1.3.

Consideration of the Petition would also violate Section 309 of the Communications Act. Under Section 309(d)(1), interested parties may file a petition to deny a license application only "prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing."[9] The statute does not permit the Commission to accept petitions to deny nearly one year *after* that application has been granted. In fact, the statute only permits the Commission to narrow the petition to deny filing window by regulation, so long as that period is

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9 In this way, the introductory statement at page 1 of the Petition that it is filed pursuant to Section 309 is clearly wrong. Further, Petitioners allegation that they act pursuant to 47 C.F.R. § 73.3584 is also inapposite -- that rule section refers to petitions to deny AM, FM, and TV broadcast license applications. Finally, Petioners claim that the Petition is filed pursuant to Section 307 of the Communications Act, but that section has nothing at all to do with petitions to deny.

"no less than thirty days following public notice." The Commission simply lacks statutory authority to entertain such a petition.

III. Consideration of the Petition is Contrary to the Public Interest.

The essence of the Petition is that the Commission should punish OCI because its parent, Omnipoint Corporation, brought suit in the D.C. Circuit and obtained a 61 day stay of the 49% equity exception, which caused the Commission to defer the Block C auction short-form filing.[10] However, to punish Omnipoint for seeking relief from the court is contrary to the Communications Act and to fundamental tenets of the Constitution.

Section 402(a) of the Communications Act was enacted expressly to permit the appeal of Commission rulemaking orders by interested parties to the U.S. Courts of Appeal, including the D.C. Circuit, for expert judicial review of the agency's rulemaking orders. As the D.C. Circuit noted nearly 25 years ago, the process of judicial review stems from "an awareness that agencies and the courts together constitute a 'partnership' in furtherance of the public interest, and are 'collaborative instrumentalities of justice.'" Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970) (footnotes omitted), *cert. denied*, 403 U.S. 923 (1971). Petitioners' request asks the Commission to set a course against that partnership by persecuting those who dare to take the Commission's decisions to the courts. In addition, action against Omnipoint would be contrary to Section 402, as *it would deter all Commission licensees from pursuing judicial review.*

Petitioners and their counsel obviously have little regard for the integrity of the judicial review process. For example, the PCS Fund, of which Petitioners Minco PCS and Southern

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10 As the Commission and Petitioners are well aware, the D.C. Circuit lifted the stay on September 28, 1995 and the Commission has announced that the auction will commence on December 11, 1995. *See*, FCC Public Notice, ""FCC Sets Auction Date of December 11, 1995 for 493 BTA Licenses Located in the C Block for Personal Communications Services in the 2 GHz Band," (September 29, 1995).

Communications are members, offered to the Commission their own "solution" to Adarand and claimed that its adoption would avoid judicial delay because any party with a right to challenge it "would not be timely enough to . . . obtain a stay from the D.C. Circuit." Comments of PCS Fund and NPPCA, PP Docket No. 93-253, at 9 (filed June 19, 1995). Sadly, the Petition represents yet another effort by these parties to convince the Commission to act in a manner designed to thwart the right to judicial process.

However, the right to seek judicial relief is a fundamental constitutional right of all aggrieved parties. *See, e.g.,* Chambers v. Baltimore and O.R.R., 207 U.S. 142, 148 (1907) ("In an organized society [the right to sue] is the right conservative of all other rights, and lies at the foundation of orderly government."); Wolff v. McDonald, 418 U.S. 539, 579 (1974) ("The right of access to the courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights."). Further, access to the courts implicates First Amendment rights. *See, e.g.,* California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) ("The right of access to the courts is indeed but one aspect of the right to petition."). To proceed against OCI's license because Omnipoint took the Commission to court is flatly contrary to these fundamental constitutional values.

To punish Omnipoint for seeking judicial protection of its constitutional and statutory rights is so adverse to the public interest that the Commission and its agents may reasonably be held liable for deprivation of federal rights, under 42 U.S.C. § 1983. *See, e.g.,* Harrison v. Springdale Water & Sewer Comm'n, 780 F.2d 1422, 1427-28 (8th Cir. 1986).

Conclusion

For the foregoing reasons, Omnipoint urges the Commission to dismiss the Petition.

Respectfully submitted,

OMNIPOINT CORPORATION

By: 

Mark J. Tauber
Mark J. O'Connor

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Its Attorneys

Date: October 4, 1995

EXHIBIT 1

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July 13, 1995

HAND DELIVER

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: PP Docket No. 93-253; GEN Dkt. No. 90-314; GEN Dkt. No. 93-252
Ex Parte Presentation

Dear Mr. Caton:

Pursuant to Section 1.1206 of the Commission's Rules, this letter is to advise you that Mark Tauber, of Piper & Marbury L.L.P., and I met today with Rudolfo Baca, Legal Advisor to Commissioner Quello. At the meeting, we discussed Omnipoint's position on the issues raised by the Further Notice of Proposed Rulemaking, released June 23, 1995, as articulated in Omnipoint's comments filed in the above-referenced dockets on July 7, 1995. We also expressed our view that several participants are publicly committed to enter the auctions, and that the proposed expansion of the "49% equity exception" would threaten the very purpose of the Entrepreneur's Band.

We expressed our support for the alternative to the proposed extension of the "49% equity exception" that would permit applicants to enter the auction under the "49% equity exception" but then require any auction winners to conform to the "25% equity exception" within a set period of time after the auction.

We also conveyed that Omnipoint is strongly opposed to the 49% equity exception as proposed, and that it is considering court action should the Commission adopt the proposed rule.

In accordance with the Commission's rules, I hereby submit one original and five copies of this letter, for inclusion in each of the above-referenced dockets.

Sincerely,

Mark J. O'Connor
Counsel for Omnipoint Corporation

cc: Rudolfo Baca

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July 11, 1995

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HAND DELIVER

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: PP Docket No. 93-253; GEN Dkt. No. 90-314; GEN Dkt. No. 93-252
Ex Parte Presentation

Dear Mr. Caton:

Pursuant to Section 1.1206 of the Commission's Rules, this letter is to advise you that Mark Tauber, of Piper & Marbury L.L.P., and I met today with Peter Tenhula of the Commission's General Counsel's Office. At the meeting, we discussed Omnipoint's position on the issues raised by the Further Notice of Proposed Rulemaking, released June 23, 1995, as articulated in Omnipoint's comments filed in the above-referenced dockets on July 7, 1995. A two-page sheet (two copies attached hereto), largely summarizing Omnipoint's comments, was provided to Mr. Tenhula.

As an alternative to the "49% equity option" available to all entrepreneurs, we proposed in the meeting that the Commission permit all applicants to qualify only under the "25% equity option," but allow minority- and women-owned applicants to offer options of an additional 24% to large non-qualifying investors. The Commission could then proceed with the auction and concurrently make the showing necessary to meet the "strict scrutiny" standard; once that showing has been made, the 24% option could be exercised. In this way, existing deals, which seem to be the Commission's primary concern, would not be materially jeopardized, and yet this proposal would not encourage the use of "fronts." We also generally supported the idea of requiring "49% equity

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option" auction winners to conform to the "25% equity option" within a set period of time.

In addition, we questioned whether existing deals would really be threatened by an elimination of the 49% equity option, and whether the record evidence supports that existing deals were dependent on the 49% equity option.

Finally, we stated that Omnipoint is strongly opposed to the 49% equity option as proposed, and that it is considering court action should the Commission adopt the proposed rule.

In accordance with the Commission's rules, I hereby submit one original and one copy of this letter for each of the above-referenced dockets.

Sincerely,

Mark J. O'Connor
Counsel for Omnipoint Corporation

cc: Peter Tenhula

(July 11, 1995 Ex Parte Presentation -- PP Dkt. No. 93-253;
GEN Dkt. No. 90-314; GEN Dkt. No. 93-252.)

OMNIPOINT CORPORATION

I. The 49% Option Will Encourage The Use Of Fronts Both Pre- and Post-Auction

-- The 49% option will undermine the very purposes of the entire entrepreneur's band. The band was meant for minorities, women and small businesses, but this rule change only helps large companies.

-- A single 49% partner can push the applicant to the very line of de facto control. Rules should deter applicants from going to the very lower limit of control.

-- 25% equity limit allows the applicant to offset investors' demands for control, and keeps the band more independent.

-- The Commission previously determined that it would not be in the public interest to make the 49% equity exception available to non-minority and male-owned firms.

-- 49% Equity Exception was only intended to offset gender and racial discrimination.

-- With the 49% exception in place, fronts can be formed at any time. The fact that the auction rules will be implemented just days before the short-form date does not prevent a large company from investing in the applicant during or after the auctions close.

II. Extending the 49% Equity Exception Undermines the Existing Deals Formed Under the 25% Equity Exception.

-- Investors in 25% equity deals will want "out" in order to obtain an additional 24% equity. However, the applicant with investors under the 25% option cannot feasibly transform into a 49% equity structure.

III. The Commission Should Either Justify the 49% Equity Exception Under Strict Scrutiny or Eliminate It.

-- The proposed rules are only superficially race-neutral. The FNPRM establishes that the rules were intended to favor minority applicants.

-- If the Commission is committed to minority preferences, it should make the required strict scrutiny showing and retain the existing rules. If not, it should make the necessary changes to the rules so that all parties are treated equally.

IV. The Commission Does Not Need to Expand the 49% Option

-- 49% equity deals that have been struck can be re-negotiated. If the Commission goes to a 25% exception for all, parties with existing deals can renegotiate.

-- Existing minority deals are put in jeopardy as investors seek new deals. In effect, the extension to all applicants negates the advantage that minorities had to counteract the access to capital problems caused by racism, sexism.

V. The Commission Should Set the Short-Form Filing Date To Permit Enough Time For Applicants To Absorb Any Rule Changes and Avoid Legal Challenges.

-- With no final rules expected until mid-July, the July 28 short-form date is patently unreasonable.

-- Some parties will have had one year to negotiate for the 49% option, partnering with many of the investors interested in pre-auction strategies. To allow other applicant only a few days, after other parties have had one year, is grossly unequal treatment.

-- The fact that these two groups are divided on the basis of race and/or gender, and that the Commission intends this result, makes the plan constitutionally suspect.

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July 11, 1995

HAND DELIVER

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: PP Docket No. 93-253; GEN Dkt. No. 90-314; GEN Dkt. No. 93-252
Ex Parte Presentation

Dear Mr. Caton:

Pursuant to Section 1.1206 of the Commission's Rules, this letter is to advise you that Mark Tauber, of Piper & Marbury L.L.P., and I met today with Ruth Milkman, Senior Legal Advisor to Chairman Hundt. At the meeting, we discussed Omnipoint's position on the issues raised by the Further Notice of Proposed Rulemaking, released June 23, 1995, as articulated in Omnipoint's comments filed in the above-referenced dockets on July 7, 1995. A two-page sheet (two copies attached hereto), largely summarizing Omnipoint's comments, was provided to Ms. Milkman.

As an alternative to the "49% equity option" available to all entrepreneurs, we proposed in the meeting that the Commission permit all applicants to qualify only under the "25% equity option," but allow minority- and women- owned applicants to offer options of an additional 24% to large non-qualifying investors. The Commission could then proceed with the auction and concurrently make the showing necessary to meet the "strict scrutiny" standard; once that showing has been made, the 24% option could be exercised. In this way, existing deals, which seem to be the Commission's primary concern, would not be materially jeopardized, and yet this proposal would not encourage the use of "fronts."

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In addition, we questioned whether existing deals would really be threatened by an elimination of the 49% equity option, and whether the record evidence supports that existing deals were dependent on the 49% equity option. We indicated that the date of issuance of licenses, and not the auction dates, should be the Commission's goal, and that a short delay for reasoned decision making will not harm the Block C licensees, especially given the high customer "churn" rate in telecommunications.

Finally, we stated that Omnipoint is strongly opposed to the 49% equity option as proposed, and that it is considering court action should the Commission adopt the proposed rule.

In accordance with the Commission's rules, I hereby submit one original and one copy of this letter for each of the above-referenced dockets.

Sincerely,

Mark J. O'Connor
Counsel for Omnipoint Corporation

cc: Ruth Milkman

(July 11, 1995 Ex Parte Presentation -- PP Dkt. No. 93-253;
GEN Dkt. No. 90-314; GEN Dkt. No. 93-252.)

OMNIPOINT CORPORATION

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-- 25% equity limit allows the applicant to offset investors' demands for control, and keeps the band more independent.

-- The Commission previously determined that it would not be in the public interest to make the 49% equity exception available to non-minority and male-owned firms.

-- 49% Equity Exception was only intended to offset gender and racial discrimination.

-- With the 49% exception in place, fronts can be formed at any time. The fact that the auction rules will be implemented just days before the short-form date does not prevent a large company from investing in the applicant during or after the auctions close.

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-- Some parties will have had one year to negotiate for the 49% option, partnering with many of the investors interested in pre-auction strategies. To allow other applicant only a few days, after other parties have had one year, is grossly unequal treatment.

-- The fact that these two groups are divided on the basis of race and/or gender, and that the Commission intends this result, makes the plan constitutionally suspect.

(July 11, 1995 Ex Parte Presentation – PP Dkt. No. 93-253;
GEN Dkt. No. 90-314; GEN Dkt. No. 93-252.)

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EXHIBIT 2

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July 14, 1995

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: PP Docket No. 93-253; GEN Dkt. No. 90-314; GEN Dkt. No. 93-252
Ex Parte Presentation

Dear Mr. Caton:

Pursuant to Section 1.1206 of the Commission's Rules, this letter is to advise you that Mark Tauber, of Piper & Marbury L.L.P., and I had a telephone conference call with Lisa Smith, Legal Advisor to Commissioner Barrett. During the call, we discussed Omnipoint's position on the issues raised by the Further Notice of Proposed Rulemaking, released June 23, 1995, as articulated in Omnipoint's comments filed in the above-referenced dockets on July 7, 1995. We also expressed our view that large, non-qualified entities could establish "front" applicants with the proposed expansion of the "49% equity exception," despite the Commission's affiliation rules and audit procedures, which would threaten the very purpose of the Entrepreneur's Band.

We expressed our support for the alternative to the proposed extension of the "49% equity exception" that would permit applicants to enter the auction under the "49% equity exception" but then require any auction winners to conform to the "25% equity exception" within a set period of time after the auction. As another alternative to the "49% equity option" available to all entrepreneurs, we proposed to Ms. Smith that the Commission permit all applicants to qualify only under the "25% equity option," but allow minority- and women-owned applicants to offer options of an additional 24% to large non-qualifying investors. The Commission could then proceed with the auction and

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concurrently make the showing necessary to meet the "strict scrutiny" standard; once that showing has been made, the 24% option could be exercised. In this way, existing deals would not be materially jeopardized.

In accordance with the Commission's rules, I hereby submit one original and five copies of this letter, for inclusion in each of the above-referenced dockets.

Sincerely,

Mark J. O'Connor
Counsel for Omnipoint Corporation

cc: Lisa Smith

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July 6, 1995

HAND DELIVER

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: PP Docket No. 93-253 -- Block C Auction Rules
Ex Parte Presentations

Dear Mr. Caton:

Pursuant to Section 1.1206 of the Commission's Rules, this letter is to advise you that Douglas Smith, of Omnipoint Corporation, Mark Tauber and Ronald Plesser, of Piper & Marbury L.L.P., and I met today with Mary McManus, Legal Advisor to Commissioner Ness. At the meeting, we discussed Omnipoint's position on the issues raised by the Further Notice of Proposed Rulemaking, released June 23, 1995, in the above-referenced docket. Specifically, we discussed Omnipoint's concern that the proposed extension of the "49% equity exception" to all entrepreneur-applicants will adversely affect entrepreneurs attempting to organize under the "25% equity exception," and increase the likelihood of "front" applicants. Further, Omnipoint discussed the need for all entrepreneurs to have a reasonable amount of time to react to the final rules before the short-form applications are due. Finally, we provided Ms. McManus with date-stamped copies of two ex parte letters Omnipoint filed on June 21 and June 22, 1995 in the above-referenced docket.

In addition, Ronald Plesser briefly met with James Casserly, Senior Legal Advisor ot Commissioner Ness, and summarized the same arguments Omnipoint presented to Ms. McManus.

In accordance with the Commission's rules, I hereby submit one original and one copy of this letter.

Sincerely,

Mark J. O'Connor
Counsel for Omnipoint Corporation

cc: James Casserly
Mary McManus